ESTTA Tracking number: **ESTTA635114**

Filing date: **10/24/2014**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91210559
Party	Defendant East Coast Network Services, LLC
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Date	10/24/2014
Attachments	ECNetServ Trial Brief.pdf(356535 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
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NetCloud, LLC Opposer v. East Coast Network Services, LLC Applicant	Opposition No. 91210559

APPLICANT'S TRIAL BRIEF

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APPLICANT'S TRIAL BRIEF

Pursuant to 37 C.F.R. § 2.128 and TBMP § 801.02(b) (2014), Applicant East Coast Network Services, LLC ("Applicant") submits its brief on the case.

STATEMENT OF THE ISSUES

Should the Board dismiss the opposition brought by Opposer NetCloud, LLC ("Opposer") because Opposer has failed to establish priority or likelihood of confusion with Applicant's NETCLOUD trademark?

STATEMENT OF THE CASE

Applicant filed the trademark application at issue on November 12, 2012, based on use of the NETCLOUD mark in International Class 42. Opposer, a limited liability company formed on December 31, 2012, filed the instant opposition proceeding alleging that it has priority over Applicant in the NETCLOUD mark, as well as likelihood of confusion with Applicant's mark.

Because Opposer has failed to establish any priority of use over Applicant, the opposition should be dismissed and the application should be permitted to proceed to registration.

DESCRIPTION OF THE RECORD

The record in this case consists of the following:

1. Opposer's Notice of Opposition;
2. Applicant's Answer to Notice of Opposition;
3. The file for Applicant's trademark application, U.S. Application Serial No. 85777557;

4. Testimonial deposition of Opposer's witness Mehul Satasia, subject to Applicant's evidentiary objections set forth below;

5. Testimonial deposition of Opposer's witness Raj Viradia, subject to Applicant's evidentiary objections set forth below; and

6. A Notice of Reliance submitted by Opposer.

ARGUMENT

I. EVIDENTIARY OBJECTIONS

A. Hearsay Objections

Applicant objects to Satasia deposition exhibits 14 through 23 inclusive as inadmissible hearsay. Exhibits 14 through 23 purport to be business records that were not created by the deponent or the deponent's company, but rather by various third parties.

Fed. R. Evid. 803(6)(D) requires such third party business records to be authenticated by a custodian or other qualified witness, or alternatively be accompanied by an appropriate certification. Since Satasia exhibits 14 through 23 were neither properly authenticated nor accompanied by an appropriate certification, Applicant requests that exhibits 14 through 23 be excluded as inadmissible hearsay.

B. Relevance Objections

Evidence which is not relevant is not admissible. Fed. R. Evid. 402. Objections on the ground of irrelevance may properly be made to evidence which is beyond the scope of the pleadings. *See Wright Line Inc. v. Data Safe Services Corp.*, 229 U.S.P.Q. 769, 769 n.4 (TTAB 1985).

1. Opposer Did Not Plead Use by Any Entity or Individual Other Than NetCloud, LLC

Applicant objects to Opposer's evidence purporting to show usage of the NETCLOUD mark by any entity or individual other than the Opposer, NetCloud, LLC, because all such evidence is beyond the scope of the pleadings. Specifically, Applicant objects to Satasia deposition 18:13-22:1, 25:3-35:15, and 36:14-42:15 and Satasia deposition exhibits 6, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, and 21. Applicant additionally objects to the Viradia deposition in its entirety including all exhibits attached thereto.

A complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests[.]" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007).[1]

A fair reading of Opposer's notice of opposition fails to provide any notice that Opposer intended to rely on usage of the NETCLOUD mark by any individual or entity other than NetCloud, LLC itself. *See, e.g.*, Not. of Opp. ¶ 1 ("Since long before any date on which Applicant could reasonably rely, Opposer has been continuously using the trademark NETCLOUD . . ."). Such failure is not a mere technicality, but rather deprived Applicant of a fair ability to meet Opposer's evidence at trial. Applicant was not provided any notice that would prompt Applicant to investigate, take discovery, and explore affirmative defenses such as abandonment regarding any usage of the NETCLOUD mark by Opposer's multiple purported predecessors-in-interest.

Because any evidence regarding usage of the NETCLOUD mark by any entity or individual other than NetCloud, LLC is beyond the scope of the pleadings, Applicant requests that all such evidence be excluded as irrelevant.

2. Opposer Did Not Plead Priority Through Analogous Use

Reliance on priority through analogous use must be pleaded. *See Cent. Garden & Pet Co. v. Doskocil Mfg. Co.*, 108 U.S.P.Q.2d 1134, 1142 (TTAB 2013); *Fair Indigo LLC v. Style Conscience*, 85 U.S.P.Q.2d 1536, 1537-38 (TTAB 2007). Usage analogous to service mark use includes use of a term in advertising brochures, catalogs, newspaper ads, and articles in newspapers and trade publications. *See T.A.B. Systems v. Pactel Teletrac*, 37 U.S.P.Q.2d 1879, 1881 (Fed Cir. 1996).

Applicant objects to all evidence proffered by Opposer to establish priority through analogous use because analogous use was not pleaded in the notice of opposition. Applicant specifically objects to Satasia deposition 27:19-29:10, Satasia deposition exhibit 11, Viradia deposition 9:14-16, 11:20-12:20, and 13:16-16:14 and Viradia deposition exhibits 1, 2, and 3.

[1]The notice of opposition and the answer thereto in an opposition correspond to the complaint and answer in a court proceeding. 37 C.F.R. § 2.116(c); TBMP § 302 (2014).

Because such evidence is beyond the scope of the pleadings, Applicant requests that it be excluded as irrelevant.

II. LEGAL ARGUMENTS

A. Applicant's Date of First Use Precedes Opposer's Formation Date

"[A]pplicant may rely without further proof upon the filing date of its application as a 'constructive use' date for purposes of priority." *Syngenta Crop Prot. Inc. v. Bio-Chek LLC*, 90 U.S.P.Q.2d 1112, 1119 (TTAB 2009).

Applicant's filing date of its application for its NETCLOUD mark, November 12, 2012, precedes Opposer's formation date, December 31, 2012, as indicated by Opposer's amended filings with the Texas Secretary of State. *See* Satasia Dep. Exs. 7-9.

Therefore, Applicant's first use of its NETCLOUD mark *ipso facto* precedes Opposer's usage of any similar mark.

B. All Usage of NETCLOUD as a Trade Name Prior to NetCloud, LLC's Formation was Illegal Under State Law[2]

"Trademark rights, either at common law or under the Lanham Act, are acquired and maintained only by lawful use." *Geraghty Products, Inc. v. Clayton Mfg. Co.*, 190 U.S.P.Q. 508, 512 (TTAB 1976). Because the use of NETCLOUD as a trade name by Opposer's purported predecessors-in-interest was illegal under state law, such use should be given no consideration in this proceeding to establish or maintain priority over Applicant.

In Georgia, every person carrying on any business or trade under a trade name other than their legal name is required to register such name with the clerk of the county superior court where the business is chiefly conducted. Ga. Code Ann. § 10-1-490. A person who fails to do so is guilty of a misdemeanor. Ga. Code Ann. § 10-1-493.

In his deposition, Mr. Viradia stated that he conducted his business from Norcross, Georgia, located in Gwinett County, Georgia, but that he did not obtain a fictitious name registration anywhere in

[2]Applicant submits the remainder of its arguments in the alternative, in the event that its evidentiary objections are not sustained.

Georgia for the use of NETCLOUD as a trade name. Viradia Dep. 33:20-34:8. As such, Mr. Viradia's use of NETCLOUD as a trade name was illegal under state law and should not be credited for the purpose of establishing or maintaining priority in the NETCLOUD mark.

Similarly, in Texas an unincorporated person who regularly conducts business under an assumed name must file an assumed name certificate in each county where the person maintains a business premises. Tex. Bus. & Com. Code Ann. §§ 71.051 - 71.054. Intentional failure to do so is a misdemeanor. Tex. Bus. & Com. Code Ann. § 71.202.

Mr. Satasia stated that he failed to file an assumed name certificate in Williamson County, Texas, where his business premises was located, for the period of time he claims to have used NETCLOUD as a trade name prior to forming NetCloud, LLC. Satasia Dep. 46:8-17. Opposer should therefore also not be credited for Mr. Satasia's illegal use of NETCLOUD as a trade name as an unincorporated sole proprietor.

Accordingly, Opposer should not be credited for any trade name usage of NETCLOUD by either Mr. Viradia or Mr. Satasia to establish or maintain priority over Applicant.

C. Acquisition of a Domain Name Does Not Constitute Trademark Use

Acquiring a domain name does not constitute trademark use for the purpose of establishing priority. *Brookfield Communications, Inc. v. West Coast Entertainment Corp.*, 50 U.S.P.Q.2d 1545, 1555 (9th Cir. 1999); *Fram Trak Industries, Inc. v. Wiretracks LLC*, 77 U.S.P.Q.2d 2000, 2005 n. 8 (TTAB 2006).

Mr. Viradia's acquisition of the netcloud.com and netcloud.us domain names and their subsequent transfer to Mr. Satasia did not create or maintain any trademark rights in the NETCLOUD mark. Mr. Satasia testified that his website was not publicly launched until "sometime towards the end of 2012," which, significantly, does not establish any priority over Applicant's first use date of November 12, 2012. Satasia Dep. 39:19-21.

D. Opposer Has Failed to Demonstrate Sufficient Usage to Create Prior Common Law Trademark Rights

At no point did NetCloud, LLC or any of its purported predecessors-in-interest ever file a federal trademark application to register the NETCLOUD mark. Therefore, Opposer may only rely on common law trademark rights to establish prior use of the mark.

"[B]ecause the right to a particular mark grows out of its use, ... [t]o prove bona fide usage, the proponent of the trademark must demonstrate that his use of the mark has been deliberate and continuous, not sporadic, casual or transitory." *Major League Baseball Props., Inc. v. Opening Day Prods., Inc.*, 74 U.S.P.Q.2d 1102, 1109 (S.D.N.Y. 2004). "[A] meager trickle of business [does not] constitute[] the kind of bona fide use intended to afford a basis for trademark protection." *Gameologist Grp., LLC v. Scientific Games Int'l, Inc.*, 508 Fed. Appx. 31, 33 (2d Cir. 2013), *citing La Societe Anonyme des Parfums le Galion v. Jean Patou, Inc.*, 181 U.S.P.Q. 545, 548 (2d Cir. 1974). *See also Natural Footwear Ltd. v. Hart, Schaffner & Marx*, 225 U.S.P.Q. 1104, 1116 (3d Cir. 1985) (holding *de minimis* gross sales of less than $5,000 per year insufficient to establish common law trademark rights).

Moreover, to the extent Opposer relies on analogous trademark use, it has fallen far short of the requisite use to sustain priority. "[A]ctivities claimed to constitute analogous use must have substantial impact on the purchasing public." *T.A.B. Systems v. Pactel Teletrac*, 37 U.S.P.Q.2d 1879, 1882 (Fed Cir. 1996). Prior advertising must be "of such a *nature and extent* that the term or slogan has become *popularized in the public mind*." *Id*. The "purchaser perception must involve more than an insubstantial number of potential customers." *Id*. at 1883. "For example, if the potential market for a given service were 10,000 persons, then advertising shown to have reached only 20 or 30 people as a matter of law could not suffice." *Id*.

Opposer has failed to show more than nominal, *de minimis* usage of the NETCLOUD mark prior to Applicant's date of first use. Mr. Viradia described his cloud hosting business as being a "personal hobby" and his initial four clients as being "left over" from an earlier business who expected to be able to interact with Mr. Viradia personally. Viradia Dep. 6:22-7:6; 31:24-32:6. Thus none of these four clients had any association with the NETCLOUD mark as a source identifying mark for cloud services, but

rather they had a personal relationship with Mr. Viradia. Moreover, these clients generated *de minimis* revenue totaling $250.00 annually. Viradia Dep. Exs. 5 - 11.

From Mr. Viradia's commencement of his hobby in 2009 through November 12, 2012, Opposer's evidence of use of NETCLOUD displayed to the purchasing public consists of three flyers and a business card. Neither Mr. Viradia nor Mr. Satasia was able to name a single additional client that either of them gained through their promotional efforts prior to Applicant's priority date of November 12, 2012. Viradia Dep. 31:24-33:19; Satasia Dep. 28:23-29:2. Further, Opposer has not proffered any evidence showing any level of recognition of Opposer's trademark by any segment of the purchasing public.

Such *de minimis* sales and promotional efforts are clearly insufficient to establish prior common law trademark rights in the NETCLOUD mark, and Opposer has therefore failed to establish priority in the mark over Applicant.

CONCLUSION

Opposer has clearly failed to establish priority over Applicant in the NETCLOUD mark. Thus, Applicant requests that judgment be entered in favor of Applicant, the opposition be dismissed, and Applicant's registration be permitted to issue.

Dated this 24th day of October, 2014.

/Russell Logan/
Russell Logan, Esquire
Attorney for Applicant

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing **APPLICANT'S TRIAL BRIEF** has been served on NetCloud, LLC by emailing said copy on 10/24/2014, to Morris E. Turek, counsel for Opposer, at morris@yourtrademarkattorney.com.

/Russell Logan/
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